



Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher Court.

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Individual Income Taxes

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INDIVIDUAL INCOME TAXES

Appeals - jurisdiction; Assessment - correctness; Appeals - frivolous. *Dennis and Pamela Jacobson vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 15, 2002). The issues in this case are:

- A. Whether the Wisconsin Tax Appeals Commission (“Commission”) has subject matter jurisdiction over the taxpayers’ petition for review.
- B. Whether the taxpayers have met their burden of proving that they did not have taxable income during any of the years 1997, 1998, or 1999 (“the years at issue”).
- C. Whether the positions asserted by the taxpayers in this matter are frivolous and groundless, thereby subjecting them to a penalty under sec. 73.01(4)(am), Wis. Stats.

During the first part of 1997, taxpayer Dennis Jacobson was employed by a freight company in Wisconsin. A few months after he left the company’s employ in 1997, he returned to the company as a contractor, supplying trucking services to it from that point forward and for all of 1998 and 1999. During most or all of the years at issue, the taxpayers’ son lived with them and paid them \$500 per month.

The taxpayers did not file Wisconsin income tax returns for any of the years at issue. The department sent them a letter requesting that they file Wisconsin returns for those years. The taxpayers did not file returns in response to the letter, and consequently the department issued a default assessment against the taxpayers for the years at issue. The taxpayers filed a document which the department construed as a petition for redetermination. The department denied the petition for redetermination, and the taxpayers filed a timely petition for review with the Commission.

The taxpayers argue that the Commission lacks subject matter jurisdiction over the assessment at issue, because the statutory section that specifies much of the Commission’s appellate authority does not list any of the substantive provisions of the tax statutes (chapter 71)

imposing the income tax and determining the measure of tax. They further argue that they have no taxable income because the payments from the freight company were payments for labor, and Wisconsin has no authority to tax labor.

The Commission concluded as follows:

A. The Wisconsin Tax Appeals Commission does have subject matter jurisdiction over the taxpayers' petition for review.

B. The taxpayers have failed to meet their burden of proving that they did not have taxable income during any of the years at issue.

C. The positions asserted by the taxpayers in this matter are frivolous and groundless, thereby subjecting them to a penalty under sec. 73.01(4)(am), Wis. Stats. The Commission assessed an additional \$750 pursuant to that statute.

The taxpayers have appealed this decision to the Circuit Court. [↗](#)

 **Appeals - timeliness.** *Daniel and Mary Callahan vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 7, 2002). The issue in this case is whether the Tax Appeals Commission ("Commission") has subject matter jurisdiction to consider the taxpayers' petition for review.

The taxpayers failed to file Wisconsin income tax returns for 1998 and 1999. The department issued an assessment of income taxes to the taxpayers for those years, in October 2001. The taxpayers filed a timely petition for redetermination with the department, arguing that because they had filed with the federal Internal Revenue Service for a "Due Process Hearing," all "state action must be abated until a determination is made."

The department denied the petition for redetermination in a notice received by the taxpayers via certified mail on February 13, 2002. The taxpayers mailed a petition for review dated April 15, 2002, via certified mail,

stamp dated April 18, 2002, and received by the Commission on April 22, 2003. The petition for review was filed three days late, as the statutory 60-day period for filing a timely petition for review expired on April 15, 2002.

The taxpayers did not dispute that their petition for review was filed beyond the 60-day filing period. Their sole argument was that the department had issued a "defective" assessment against them.

The Commission concluded that it lacks subject matter jurisdiction to consider the petition for review, because the taxpayers failed to file the petition in a timely matter. Because it does not have subject matter jurisdiction, the Commission cannot rule on the taxpayers' "defective assessment" argument.

The taxpayers have appealed this decision to the Circuit Court. [↗](#)

 **Assessments - presumption of correctness; Partnerships - basis.** *Gayle R. Dvorak and Norene M. Dvorak vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, November 25, 2002). This is an appeal by the taxpayers, of an April 30, 2002, decision of the Wisconsin Tax Appeals Commission ("Commission"). See *Wisconsin Tax Bulletin* 130 (July 2002), page 23, for a summary of the Commission's decision.

The department made two assessments against the taxpayers, one for tax year 1986 and the other for tax years 1982 through 1985. The taxpayers filed petitions for redetermination of both of the assessments, and after

numerous extension agreements, the department granted the petitions for redetermination in part and denied them in part.

Most of the disputes in this case relate to four issues involving four corporations and a partnership in which Gayle Dvorak ("the taxpayer") had an interest. The four issues are; (1) whether the taxpayer had substantiated adjustments to his bases in the corporation, (2) the taxpayers' gain on the sale of their personal residence, (3) the adjusted total of the itemized deductions claimed on the taxpayers' 1983 tax return, and (4) an addition of \$83,500 to the taxpayers' 1985 income tax return for the asserted cancellation of a debt. The Commission held

that the taxpayers did not overcome the presumptive correctness of the department's actions on these four issues, thus affirming the department's actions on the petitions for redetermination.

The Circuit concluded that as for the arguments in the taxpayers' brief, they have failed to produce evidence

that the department's assessments were incorrect. Based on that conclusion, the Circuit Court affirmed the decision of the Commission.

The taxpayers have not appealed this decision. [↗](#)

 **Claims for refund - within four yeas of original return's due date; Appeals - premature.** *Gabriel F. De Rango vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 2, 2003). The issue in this case is whether the Wisconsin Tax Appeals Commission ("Commission") has subject matter jurisdiction over two petitions for review filed by the taxpayer. The first petition the taxpayer's claim for refund for 1992, and the other relates to his claim for refund for 1996.

The taxpayer filed a timely original 1992 Wisconsin income tax return. In June 1997, he filed an amended 1992 return, constituting a 1992 claim for refund. The department denied the 1992 refund claim on the basis that it was filed more than four years following the unextended due date of the original 1992 tax return. The taxpayer filed a timely petition for redetermination, the department denied it, and the taxpayer then filed a timely petition for review with the Commission.

The taxpayer filed his original 1996 Wisconsin income tax return in April or May of 1997. He filed an amended 1996 return in June 1997, constituting a 1996 claim for refund. The department denied the 1996 refund claim in October 1997, and the taxpayer filed a timely petition for redetermination.

On April 29, 1998, the taxpayer and the department agreed to extend the due date to May 11, 1999, for the department to act on the petition for redetermination. On July 16, 1998, the taxpayer filed a petition for review with the Commission with respect to his 1996 refund claim.

On May 11, 2001, the department denied the taxpayer's petition for redetermination with respect to the 1996 refund claim. The taxpayer subsequently filed a timely petition for review of the department's action. That petition for review is not a part of these proceedings.

The Commission concluded that it lacks subject matter jurisdiction over the 1992 refund claim, because the refund claim was filed more than four years after the unextended due date of the original 1992 Wisconsin income tax return. It further concluded that it lacks subject matter jurisdiction over the petition for review regarding the 1996 refund claim, because the petition for review was filed before the department acted on the petition for redetermination.

The taxpayer has appealed this decision to the Circuit Court. [↗](#)

 **Claims for refund - within two years following assessment.** *Marvin D. Coleman vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 28, 2003). The issue in this case is whether the amendment to sec. 71.75(5), Wis. Stats., whereby the time period for filing a claim for refund after an assessment was increased from two years to four years after the assessment, applies to the department's assessment against the taxpayer.

The taxpayer did not file a 1996 Wisconsin income tax return by the April 15, 1997, due date. The department sent him a letter requesting that he file the 1996 return,

and the taxpayer claims he did not receive it. The department issued an estimated assessment against the taxpayer on November 9, 1998, which included 1996 income tax, interest, penalties, and a late filing fee. Concerned over the demand for payment without proper representation, the taxpayer paid the assessment, with updated interest, in October 1999.

The taxpayer filed his 1996 Wisconsin income tax return in January 2001, reflecting an \$84 refund, not including the estimated assessment that had been paid. The department issued a refund for \$54 in February 2001, after subtracting a \$30 late filing fee.

The taxpayer filed a petition for redetermination with the department, dated May 8, 2001, in which he did not object to the \$54 refund but asked for a refund of the estimated assessment payment he had made in October 1999. The department denied the petition for redetermination, on the basis that the statute in effect when the assessment was made and paid provided that a claim for refund had to be made within two years after the assessment (i.e., by November 2000). The taxpayer filed a timely appeal to the Commission.

On appeal, the taxpayer contends that the amended statute applies and that he had four years (i.e., until November 2002) to file his claim for refund, on the basis that there was not an effective date in the Act that provided the amendment to four years. The department

counters that there *was* an effective date in the Act that provided the amendment, and that the treatment of the amendment “first applies to refunds for taxable years beginning on January 1, 2000.”

The Commission concluded that the amendment to sec. 71.75(5), Wis. Stats., whereby the time period for filing a claim for refund after an assessment was increased from two years to four years after the assessment, does not apply to the department’s assessment against the taxpayer. The amendment first applied to refunds for taxable year 2000, and the taxpayer’s claim pertains to taxable year 1996.

The taxpayer has not appealed this decision. [↗](#)

 **Employer - nonresident entertainer; Employer - required to withhold; Business deductions - wages.** *Kirk D. and Maria A. Seefeld vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 13, 2002). The issues in this case are:

- A. Whether the taxpayers were the “employer” of nonresident entertainers, as the term is defined in sec. 71.63(3), Wis. Stats., during 1994 through 1996 (“the period under review”).
- B. Whether the department correctly assessed the taxpayers under sec. 71.80(15)(e), Wis. Stats., the amounts which they were required to withhold and transmit to the department because they failed to require proof that the nonresident entertainers had filed surety bonds or made cash deposits, pursuant to sec. 71.80(15)(b), or (c), Wis. Stats.
- C. Whether, under sec. 71.05(6)(a)8, Wis. Stats., the department correctly disallowed deductions for commission fees that the taxpayers claimed on their Wisconsin income tax returns during the period under review, because they failed to comply with secs. 71.63(3) and (4), 71.64(4) and (5), and 71.80(15), Wis. Stats.

The taxpayers filed their 1994 through 1996 Wisconsin income tax returns. During this period, they were Wisconsin residents and married to each other.

In November 1998, the department issued an assessment to the taxpayers, consisting of income tax, interest, and a penalty. The adjustments included changes to the tax-

payers’ federal Schedule Cs, their self-employment tax deduction, recycling surcharge, and, significantly in this case, deductions claimed on their Schedule Cs for commissions paid to nonresident entertainers on engagement contracts (“contracts”) exceeding \$3,200. The taxpayers filed a petition for redetermination with the department, in which they admitted that they paid commissions to nonresident entertainers and filed Forms 1099 for the payments. The department issued a Notice of Action on the petition for redetermination, granting it in part and denying it in part. The taxpayers then filed a petition for review with the Commission.

During the period under review, the taxpayers owned and operated, as a sole proprietorship, an entertainment-booking agency. They generated business by seeking out or providing services to entertainment buyers and venue owners/operators, who wanted entertainment for certain occasions. They also found specific types of entertainment at the request of the buyers of the entertainment (i.e., their clients). They used contract forms in their business. Each of the 22 contracts in the record was for nonresident entertainers performing in Wisconsin. Each one is signed on a line designated “Purchaser Name” (“taxpayers’ client”), and on all 22 contracts, the line designated “Leader Name” is signed on behalf of the nonresident entertainer or nonresident entertainment company (“nonresident entertainer”).

The taxpayers negotiated the terms and conditions in the contracts on behalf of their clients and arranged for the entertainment performed by nonresident entertainers. They prepared the contracts, which were signed by their clients and nonresident entertainers; approved the contracts before they were sent to be signed; sent the

contracts to their clients and to nonresident entertainers, who signed them; approved any amendment to the contracts; and booked the entertainment covered by the contracts.

The taxpayers were paid a “binder fee” for finding entertainers, negotiating the contracts, and booking the entertainment. Pursuant to the contracts, the taxpayers’ clients sent them the security deposit, balance due, and binder fee. The taxpayers deposited these amounts into their business checking account; paid each nonresident entertainer the security deposit, and paid each nonresident entertainer the balance due under the contracts, immediately before the entertainment.

The department considers the taxpayers the employers of the non-resident entertainers under sec. 71.63(3), Wis. Stats. The nonresident entertainers covered by the contracts (which, in every instance here, exceeded \$3,200 per performance) did *not*; (a) provide the department with a surety bond equal to 6% of the total contract amount; (b) make a cash deposit with the department equal to the amount of surety bond required; or (c) provide the taxpayers with proof that a surety bond had been provided to the department. The taxpayers did not require or receive proof that the nonresident entertainers did any of the above.

Neither the taxpayers nor any other person or business withheld taxes from the amounts paid to the nonresident entertainers. Neither did the taxpayers withhold amounts

from nonresident entertainers’ payments for which a surety bond should have been provided. The department did not issue to the nonresident entertainers a Form WT-11 to prove that the department received a surety bond or cash deposit from the nonresident entertainers.

The Commission concluded as follows:

- A. The taxpayers were the “employer” of nonresident entertainers, as the term is defined in sec. 71.63(3), Wis. Stats., during the period under review.
- B. The department did correctly assessed the taxpayers under sec. 71.80(15)(e), Wis. Stats., the amounts which they were required to withhold and transmit to the department because they failed to require proof that the nonresident entertainers had filed surety bonds or made cash deposits, pursuant to sec. 71.80(15)(b), or (c), Wis. Stats.
- C. The department did correctly disallow, under sec. 71.05(6)(a)8, Wis. Stats, deductions for commission fees that the taxpayers claimed on their Wisconsin income tax returns during the period under review, because they failed to comply with secs. 71.63(3) and (4), 71.64(4) and (5), and 71.80(15), Wis. Stats.

The taxpayers have not appealed this decision. [☞](#)

SALES AND USE TAXES

 **Exemptions - common or contract carriers.** *Freight Lime And Sand Hauling, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 20, 2002). The issue in this case was whether the Commission should adhere to its prior decisions that limit the application of the exemption from sales and use tax found in sec. 77.54(5)(b), Wis. Stats., to contract carriers that transport property that has value, so that the taxpayer’s purchases of trucks and related equipment during the period from January 1, 1992, through December 31, 1998, do not qualify for the exemption.

The taxpayer is a Wisconsin corporation, licensed by the Wisconsin Department of Transportation as a contract motor carrier, and in the business of hauling items in three distinct divisions or lines of business. One division

hauled bulk materials such as sand, lime, and other aggregates for factories and other uses. Another division hauled bulk food grade product throughout the United States. The third division contracted with disposal companies to transport waste between the disposal companies’ transfer stations and their disposal sites. It is the taxpayer’s purchases of trucks and related equipment for use in the third division’s operations that are in question.

Disposal companies picked up waste from homes and businesses in municipalities with which these companies contracted and hauled the waste to their respective intermediate transport stations. The taxpayer would then haul the waste from these transfer stations to disposal sites designated by the disposal companies. The ultimate control over the waste hauled by the taxpayer remained with the disposal companies. The taxpayer was paid by the disposal companies based on the volume of waste the taxpayer hauled, set as an amount per ton of waste,

with a minimum load guarantee. The waste hauled by the taxpayer had no positive economic value and was not marketable at the time the taxpayer hauled it.

The Commission concluded the taxpayer's purchases of trucks and related equipment during the period from January 1, 1992, through December 31, 1998, qualify for exemption from sales and use tax under sec. 77.54(5)(b), Wis. Stats., because the destination of the waste hauled by the taxpayer was determined by the taxpayer's customers, not the taxpayer.

Section 77.54(5)(b), Wis. Stats., exempts from sales and use tax certain items "sold to ...contract carriers who use such (items) exclusively as ...contract carriers..." This section does not define "contract carriers." In *Gensler v. Department of Revenue*, 70 Wis. 2d 1108 (1975), the Supreme Court held that in construing this exemption it was appropriate to rely upon the definitions set forth in sec. 194.01, Wis. Stats. This section defines contract carrier as "any person engaged in the transportation by motor vehicle over a regular or irregular route upon the public highways of property for hire."

In *Superior Hazardous Waste Group, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 17, 1998), the Commission held that the

definition of "contract carrier" was limited to a carrier that hauled property with value. The department took the position that persons hauling waste were not hauling "property" and, therefore, did not fall within the definition of a contract carrier hauling property for hire. However, the Commission now concludes "...We believe that construing the definition of contract carrier in section 77.54(b) to apply only to carriers that transport property with positive value is unreasonably narrow...." Therefore, to the extent the prior decisions held that property transported has to have value in order to qualify for the exemption in sec. 77.54(5)(b), Wis. Stats., the Commission concludes those holdings are to be disregarded. There is no requirement by either sec. 77.54(5)(b), or 194.01(2), Wis. Stats., that the property hauled have positive, negative, or no value, as long as it is property of others and is hauled for hire.

The Commission concluded that the exemption for trucks and related equipment used by contract carriers does not extend to disposal services. The taxpayer does not operate a disposal service. Rather, the taxpayer hauls property from one point to another point as designated by its customers.

The department has not appealed this decision. [↗](#)



Exemptions - printed advertising materials.

Plaza Publications, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 31, 2003). The issues in this case are:

- A. Whether purchases of printed advertising materials by Plaza Publications, Inc. ("Plaza") during the years 1996 through 1999 ("the period under review"), that were shipped outside Wisconsin, qualify for the exemption in sec. 77.54(25), Wis. Stats., for printed advertising materials purchased and stored for the purpose of subsequently transporting them outside the state by the purchaser for use solely outside the state.
- B. Whether an exemption certificate provided by Plaza to a printing company ("the printer") was sufficient to exempt Plaza from use tax due on printed advertising materials purchased from the printer and distributed free to Wisconsin locations.
- C. Whether Plaza was negligent under sec. 77.60(3), Wis. Stats., for failure to report use tax on the pur-

chases of printed advertising materials that were shipped to Wisconsin locations.

- D. Whether the tax due on the printed advertising materials shipped to Wisconsin locations was subject to delinquent interest under sec. 77.60(2), Wis. Stats.

Plaza is a Wisconsin corporation engaged in the publication of printed advertising materials. Plaza's primary business is the publication of tourism-related publications for which Plaza sells advertising. A major client was the Greater Milwaukee Convention and Visitor's Bureau ("GMCVB"), for which Plaza published the *Milwaukee Visitor's Guide* and the 1994 *Greater Milwaukee Meeting Planner's Guide*. Plaza was not paid by GMCVB, but kept revenues it generated from the sales of advertising in the publications. The publications are printed by the printer and are distributed free, within and outside Wisconsin.

Plaza had a Wisconsin seller's permit but did not report any sales during the period under review, and it had the seller's permit inactivated in December 1997. Plaza purchased taxable printed advertising materials or printing

services from the printer during the period under review, paying no sales tax to the printer, and providing the printer with a continuous exemption certificate stating “Our publications are always given away free. Never sold.” The printed advertising materials were delivered by contract carrier, at Plaza’s direction, to locations within and outside Wisconsin. None of the publications were sold by Plaza. GMCVB gave away and did not sell the publications.

The Commission concluded as follows:

A. Plaza’s purchases of printed advertising materials during the years 1996 through 1999, which were shipped outside Wisconsin, qualify for the exemption in sec. 77.54(25), Wis. Stats. The printed materials Plaza purchased from the printer for use by GMCVB outside Wisconsin are covered by this exemption. The printed materials delivered to GMCVB for use in Wisconsin are not exempt.

The Department contended the exemption in sec. 77.54(25), Wis. Stats., did not apply because the printed advertising materials were not transported outside the state “by the purchaser.”

B. The improperly completed exemption certificate given to the printer did not relieve Plaza from the use tax due on printed advertising materials purchased from the printer and distributed free to *Wisconsin locations*.

C. Plaza was negligent under sec. 77.60(3), Wis. Stats., for failure to report use tax on the purchases of printed advertising materials that were shipped to Wisconsin locations. Plaza cannot delegate its responsibility to comply with the tax law to the printer, and it has not demonstrated that its non-compliance with the law was due to good cause and not due to neglect.

D. The tax due on the printed advertising materials shipped to Wisconsin locations was subject to delinquent interest under sec. 77.60(2), Wis. Stats., because the tax was not paid by the due date of a return, had one been filed.

The department has appealed this decision to the Circuit Court. The taxpayer has not appealed the decision. [☞](#)

SALES AND USE TAXES, AND WITHHOLDING OF TAXES

 **Officer liability.** *Michael A. Pharo and Brenda Pharo vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, October 16, 2002). This is an appeal of an order of the Circuit Court for Dane County, dated October 30, 2001. The Circuit Court dismissed the taxpayers’ appeal of the March 23, 2001, decision of the Wisconsin Tax Appeals Commission, which held that both taxpayers were persons responsible for the withholding and sales/use taxes of American Alarm & Telephone Corporation. The basis for the dismissal was that the taxpayers failed to comply

with the briefing schedule that the Circuit Court had issued. See *Wisconsin Tax Bulletin* 125 (July 2001), page 20, for a summary of the Commission’s decision (the Circuit Court order was not summarized).

The Court of Appeals concluded that the Circuit Court’s order of dismissal was appropriate, because the taxpayers failed to show a clear and justifiable excuse for their failure to comply with the Circuit Court’s briefing schedule, and it affirmed the order of the Circuit Court.

The taxpayers appealed the Court of Appeals’ decision to the Wisconsin Supreme Court. The Supreme Court denied the petition for review on January 21, 2003. [☞](#)

MOTOR VEHICLE FUEL TAX

 **Officer liability.** *Daniel J. Bender and Carol J. Bender vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 11, 2002). Although each taxpayer was heard as a separate case, the decisions were combined and therefore they

are summarized together. The issues in these cases are whether the taxpayers are responsible persons who are liable for the unpaid motor vehicle fuel tax of L. L. Bender Oil Corporation (“the corporation”), under sec. 78.70(6), Wis. Stats., for July 1998.

The taxpayers were officers of the corporation, were in charge of the corporation’s day-to-day operations, and

were authorized to sign checks on the corporation's checking account.

In July and August 1998, the taxpayers signed and issued checks to pay creditors other than the department. The corporation sold fuel and collected motor vehicle fuel tax from customers, but it did not remit the fuel tax it collected on sales made during July 1998. One of the corporation's suppliers of motor vehicle fuel provided the department with substantiation that it was unable to recover the fuel tax from the corporation pursuant to sec. 78.01(25), Wis. Stats., on fuel sold to the corporation.

The Commission concluded that the taxpayers are personally liable under sec. 78.70(6), Wis. Stats., for the unpaid motor vehicle fuel tax of the corporation for July 1998. The Commission awarded summary judgment to the department, as there was no genuine issue as to any material fact and the department is entitled to summary judgment as a matter of law.

The taxpayers were **officers** of the corporation, were in charge of the corporation's day-to-day operations, were authorized to sign checks on the corporation's checking account, and had **authority** to pay the corporation's motor vehicle fuel tax. As persons with authority, and who knew or should have known that the corporation had not paid the July 1998 fuel tax, the taxpayers had a **duty** to see that corporate funds were used to pay the fuel tax liability. The taxpayers paid several creditors while the fuel tax for July 1998 was not paid.

The taxpayer's claim that the motor vehicle fuel tax is not imposed on them is not supported because sec. 78.12(3), Wis. Stats., provides that any person in possession of motor vehicle fuel, upon which the fuel tax has not been paid, shall pay the tax.

The taxpayers have appealed this decision to the Circuit Court. [↗](#)